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In The Supreme Court of the United States

ORIGINAL JURISDICTION

OCTOBER TERM, 1925.

THE STATE OF WISCONSIN, THE STATE OF OHIO, THE STATE OF PENNSYLVANIA AND THE STATE OF MINNESOTA,
Complainants.
vs.
STATE OF ILLINOIS AND SANITARY DISTRICT OF CHICAGO,
Defendants.
STATE OF MISSOURI, STATE OF TENNESSEE, AND STATE OF LOUISIANA,
STATE OF KENTUCKY
Intervening Defendants.

Bill in Equity
Original
Jurisdiction
No. [redacted] 7

NOTICE AND MOTION, BRIEF AND ARGUMENT FOR THE STATES OF INDIANA AND MICHIGAN AS *AMICI CURIAE*.

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Solicitors for Petitioners.

ROBERT SMITH COMPANY, LANSING, MICH.

INDEX

SUBJECT—STATEMENT OF FACTS

	Page
State of Indiana adopts statement of facts in Complainant's brief	6
State of Michigan adopts statement of facts in complainants' brief with explanation of her own position	6

ARGUMENT.

Point I.

The Great Lakes and connecting waters constitute a great natural highway which neither defendants nor any other agency has power to impair by appropriating or abstracting water from Great Lakes watershed and directing it into another watershed	7-8

Point II.

Even if the Congress had the power, which we deny, to authorize the abstraction of any water from one natural watershed and divert it to another, it has not exercised such power	8-11

APPENDIX

Page

Copy of concurrent resolution of the legislature of Michigan, adopted February 19th, 1925, asserting that state's interest in the waters of the Great Lakes and opposing abstraction therefrom by Sanitary District of Chicago .. 11-14

TABLE OF CASES CITED

C

Page

Cobb v. Lincoln Park Commissioners, 202 Ill. 427, 67 N. E. 5, 63 L. R. A. 264 9

H

Hubbard v. Fort, 188 Fed. 987 (993) 9

K

Kansas v. Colorado, 206 U. S. 46 7

P

Port of Seattle v. Oregon & Washington Ry. Co. 255 U. S. 56 8

S

Sanitary District v. United States, 266 U. S. 405 .. 10

W

Wilson v. Hudson County Water Co., 76 N. J. Eq. 543, 76 Atl. 560 9

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NOTICE OF MOTION

Please take notice that at the opening of the session of the Supreme Court of the United States on Monday, the 1st day of March, 1926, or as soon thereafter as

counsel can be heard, the undersigned will submit the annexed motion for leave to file a brief on behalf of the State of Michigan and the State of Indiana as amici curiae.

ANDREW B. DOUGHERTY,
Attorney General of the State of Michigan,
ARTHUR L. GILLIOM,
Attorney General of the State of Indiana,
FRED C. GAUSE,
Of Counsel for the State of Indiana,
Solicitors for Petitioners.

Dated this 18th day of February, 1926.

To OSCAR E. CARLSTROM,
Attorney General of Illinois,
HECTOR A. BROUILLET,
Attorney, the Sanitary District of Chicago,
Solicitors for Defendants,
and
NORTH T. GENTRY,
Attorney General of Missouri,
FRANK M. THOMPSON,
Attorney General of Tennessee,
FRANK E. DAUGHERTY,
Attorney General of Kentucky,
PERCY SAINT,
Attorney General of Louisiana,
CORNELIUS LYNDE,
DANIEL N. KIRBY,
Solicitors for Intervening Defendants.

IN THE
SUPREME COURT OF THE UNITED STATES
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MOTION FOR LEAVE TO FILE BRIEF ON BEHALF OF THE STATE OF MICHIGAN AND THE STATE OF INDIANA, AS AMICI CURIAE

Now comes Andrew B. Dougherty, Attorney General of the State of Michigan, and Arthur L. Gilliom, Attorney General of the State of Indiana, and states,

there is involved in this suit, the question of the authority or right of defendants to abstract water from the Great Lakes and their watershed and divert the same into a different watershed, which abstraction reduces the navigable capacity of said Great Lakes, in which petitioners have a direct proprietary interest for purposes of highways and other uses which are of great interest and value to the people and the prosperity of said states. That by reason of the interests of the People of the State of Michigan and of the People of the State of Indiana in this matter, the undersigned desire to submit a brief in their behalf on the questions involved in this case.

Therefore, leave is prayed to file the brief attached hereto on behalf of the People of the State of Michigan and the People of the State of Indiana as amici curiae.

Respectfully submitted,

ANDREW B. DOUGHERTY,
Attorney General of Michigan,

ARTHUR L. GILLIOM,
Attorney General of Indiana,

FRED C. GAUSE,
Of Counsel for the State of Indiana,
Solicitors for Petitioners.

Dated this 18th day of February, 1926.

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BRIEF AND ARGUMENT FOR THE STATE OF MICHIGAN AND INDIANA AS AMICI CURIAE

May It Please the Court:

The States of Michigan and Indiana, joining in this brief, have, together with all other States in the Great

Lakes basin, large and important interests in the commerce and use of the Great Lakes, the waters of which are being abstracted by the Defendants State of Illinois and the Sanitary District of Chicago. The State of Michigan alone has 1,624 miles of shore line on the Great Lakes and the connecting waters.

The State of Indiana in the interest of brevity adopts the statement of facts contained in the brief filed by complainants.

The State of Michigan also in the same interest does likewise for the purpose of this suit and this brief. But that the Court may be fully informed as to the position of the State of Michigan with respect to the full rights of that State in and to the use of the waters of the Great Lakes basin, that State asserts that although she submits that complainants are fully entitled to the relief asked, she urges such relief on the ground that neither defendants nor any agency, international, national or State, may abstract and permanently divert from the Great Lakes and their natural watershed any water whatever and to secure such determination she is submitting to this Honorable Court her bill of complaint, praying for full and complete relief from the acts of defendants, State of Illinois and Sanitary District of Chicago in abstracting waters from the Great Lakes and diverting from the Great Lakes watershed the waters of the Chicago River.

The position of the State of Michigan in respect to the matters stated is expressed in the concurrent resolution of her legislature adopted on February 19th, 1925, a copy of which is hereto attached as appendix I.

ARGUMENT.

I.

THE GREAT LAKES AND CONNECTING WATERWAYS CONSTITUTE A GREAT NATURAL HIGHWAY WHICH NEITHER DEFENDANTS NOR ANY OTHER AGENCY HAS POWER TO IMPAIR BY APPROPRIATING OR ABSTRACTING WATER FROM THE GREAT LAKES WATERSHED AND DIVERTING IT INTO ANOTHER WATERSHED.

Citation of authorities in support of the above statement is unnecessary. Under the commerce clause of the Constitution, Congress has the power to regulate navigation over the Great Lakes as they constitute a highway used in interstate commerce.

The defendants assume that since Congress has the authority to regulate navigation over this marine highway that it must also have full and exclusive proprietary right therein any may, if it chooses, remove that highway or any portion thereof to some other locality. That Congress does not have that power seems to be clearly settled in Kansas vs. Colorado, 206 U. S., 46.

The Constitution of the United States does not in terms give to the Congress any authority over navigable highways other than the power to regulate navigation as found in the commerce clause and it cannot be presumed, against the interests of the States which granted the limited and enumerated powers of the Federal Government, that they surrender their own rights to the United States. This Honorable Court said in Kansas v. Colorado, supra,

> "It still is true that no independent and unmentioned power passes to the national government or can rightfully be exercised by the Congress."

This honorable Court held in Port of Seattle vs. Oregon and Washington Railroad Company, 255 U. S., 56, that the right of the United States in the navigable waters within the several states is limited to the control thereof for purposes of navigation; and subject to that right each state became, upon its organization as a state, the owner of the navigable waters within its boundary and of the land under the same.

II.

EVEN IF THE CONGRESS HAD THE POWER, WHICH WE DENY, TO AUTHORIZE THE ABSTRACTION OF ANY WATER FROM ONE NATURAL WATERSHED AND DIVERT IT TO ANOTHER, IT HAS NOT EXERCISED SUCH POWER.

The Rivers and Harbors Act which authorized the Secretary of War to pass upon obstructions to the navigable capacity of navigable waters did not by express terms or implication authorize the Secretary of War to abstract the waters from the Great Lakes watershed either for the purpose of building a new navigable highway in another part of the country or for the purpose of furnishing cheap sewage disposal facilities for a local interest or the development of hydro-electric power for a similar local interest. Had the Congress undertaken to exercise such power or to delegate the exercise of such power to an administrative officer, the act would have been unconstitutional.

We submit that the Congress in legislating as to ob-

structions to the navigable capacity of existing waterways under the powers granted to it by the commerce clause could hardly have intended to divest the various states bordering on the Great Lakes and the Dominion of Canada of their sovereign rights in such waters and to appropriate them to the national government and then transfer all of that vested power over navigable waterways, carrying over one-quarter of the waterborne commerce of the United States, to the administrative discretion of an administrative officer.

That the Secretary of War's authorization to construct any work in or about a navigable waterway is merely a *license* to do the work and not a grant of *power* to do it has been held in

Hubbard vs. Fort, 188 Fed. 987 (993)
Cobb vs. Lincoln Park Comrs., 202 Ill. 437, 67 M. E. 5, 63 L. R. A. 264.
Wilson vs. Hudson County Water Co., 76 N. J. Eq. 543, 76 Atl. 560.

This construction of the nature of the right conferred by the permit of the Secretary of War is supported by the note at the heading of the permit of March 3rd, 1925, which head-note is as follows:

"Secretary of War Order
Secretary of War's Decision on the Chicago Drainage Case.

NOTE:—It is to be understood that this instrument does not give any property rights either in real estate or material, or any exclusive privileges; and that it does not authorize any injury to private property or invasion of private rights, or any infringement of federal, state, or local laws or regulations, nor does it obviate the necessity of obtaining state assent to the work authorized. IT MERELY EXPRESSES THE ASSENT OF

THE FEDERAL GOVERNMENT SO FAR AS CONCERNS THE PUBLIC RIGHTS OF NAVIGATION. (See Cummings vs. Chicago, 188 U. S. 410)."

We submit that the requirement of the Secretary of War that State assent to the work be obtained has never been met by the defendant Sanitary District. So far as either the bill of complaint or the motion or brief of the defendants disclose the facts, no State has assented to the abstractions of water from the Great Lakes basin except the State of Illinois. The other Great Lakes States having proprietary interests in the water of the Great Lakes and the Dominion of Canada have not consented. The State of Illinois only contributes about 3% of the water flowing into the Great Lakes basin or about one thousand cubic second feet. While the defendant Sanitary District, with the assent of that one State, is taking and proposes to take at least ten times that amount of water without the consent of the other States and the foreign power interested.

Section 10 of the Rivers and Harbors Act of March 3, 1899, prohibits any obstruction to the navigable capacity of navigable waters of the United States unless *affirmatively* authorized by Congress. This Honorable Court in Sanitary District vs. United States, 266 U. S. 405, said: "As now applied it concerns a change in the condition of the lakes and the Chicago River, admitted to be navigable, and if that be necessary *an obstruction to their navigable capacity.*" (Italics added.) It consequently follows that the Secretary of War was without authority even under the terms of the statute to express the assent of the Federal Government in the permit issued. The permit was neither

asked for nor issued until after the work had been commenced.

We submit that there is no permit in substance authorizing the defendant Sanitary District to abstract water from the Great Lakes. The permit in substance authorizes the abstraction of water only if it does not unreasonably interfere with navigation. If the abstraction does unreasonably interfere with navigation then the District has no permit. If the rule that the demurrer or motion to dismiss admits the facts in the bill is applied then interference with navigation being established by the pleadings, the permit of the Secretary of War becomes, by express limitation, a nullity. Since the brief of defendant State of Illinois admits the lowering of Lake levels by its appropriation of water from the Great Lakes, the permit appears to fail even without reference to the rule above referred to.

All of which is respectfully submitted.

ANDREW B. DOUGHERTY,
Attorney General of Michigan,
ARTHUR L. GILLIOM,
Attorney General of Indiana,
FRED C. GAUSE,
Of Counsel for the State of Indiana,
Solicitors for Petitioners.

Appendix I.

House Concurrent Resolution No. 5.

A concurrent resolution protesting against the unlawful abstraction of the waters of Lake Michigan by the Sanitary District of Chicago, or any other person or agency.

Whereas, The State of Michigan has a full proprietary ownership in all the waters in the Great Lakes within the boundary lines of the State, and as such owner the State is entitled at all times to have an uninterrupted flow of all the waters coming naturally into the Great Lakes Basin, and is duty bound to protect and preserve the right of the State to these waters; and

Whereas, The Sanitary District of Chicago has been for a long time unlawfully abstracting large quantities of the waters of Lake Michigan and diverting these waters from the Great Lakes Basin into the Mississippi River Basin; and

Whereas, There are now pending in the Congress of the United States bills purporting to be measures for the improvement of commerce and navigation which would authorize on the part of the Federal Government a diversion of ten thousand cubic feet per second of water from Lake Michigan for the alleged improvement of the navigation of waters lying outside the Great Lakes Basin, but which said bills are in fact for the purpose of an attempted legalization of the abstraction of these waters by the Sanitary District of Chicago for its own use and benefit; and

Whereas, An abstraction and diversion of the waters of Lake Michigan does and will so injure the navigability of the Great Lakes and the connecting waters that it makes navigation of the many harbors in Michigan difficult and dangerous and the maintenance of these harbors more costly; seriously affects the immense fruit interests in the State and jeopardizes their development through chemical changes due to the diversion of the natural flow of these waters, retards the building up the Great Lakes navigation, both as to

gross volume and the size and draft of the vessels employed; seriously affects privately owned docks, elevators, warehouses, railroad lines and many other constructions built to take and ship lake tonnage; and

Whereas, The Sanitary District of Chicago has petitioned the Secretary of War of the United States for a permit to authorize the said District to abstract ten thousand cubic feet per second of the waters of Lake Michigan, and the Secretary of War has set the date of February 20, 1925, as the time when he will, at his office at Washington, D. C., hear the said petition and the objections to be made to the granting of any such permit; therefore, be it

Resolved, By the House of Representatives of the State of Michigan, (The Senate concurring) That for and in behalf of the people of the State, we vigorously protest against and object to the continued unlawful diversion and abstraction of the waters of Lake Michigan by the Sanitary District of Chicago, and be it further

Resolved, That we oppose and object to any scheme or plan of improvement of the navigable waters of the United States at the expense of and to the detriment of the continued improvement and natural navigability of the Great Lakes; and be it further

Resolved, That we commend the Attorney General of this State for the very active and able service rendered the people in leading the opposition of the Lake Border States to any unlawful abstractions and diversions of these waters, and urge him to continue all necessary activities in protection of the States' rights in and to these waters; and be it further

Resolved, That a committee consisting of three State Representatives to be appointed by the Speaker of the

House of Representatives, and two State Senators to be appointed by the President of the Senate, be appointed and authorized and directed to proceed to Washington, D. C., together with the Attorney General of this State, and at the appointed time and place present, as such committee, to the Secretary of War, the protest and objection of the State of Michigan to the granting of any permit authorizing the abstraction or diversion of any of the waters of the Great Lakes, and especially as petitioned for by the Sanitary District of Chicago. The actual and necessary expenses of such committee shall be allowed and paid when accounts therefor have been certified to as correct by the Speaker of the House and the President of the Senate, and be it further

Resolved, That a copy of these resolutions, duly prepared by the Secretary of the Senate and certified to by the said Secretary and the Clerk of the House of Representatives be transmitted by the said Secretary of the Senate to the Honorable, The Secretary of War of the United States; to each of the Michigan members in Congress; to the Secretary of the Senate and the Secretary of the House of Representatives of Congress; and to the Attorney General of this State.